

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

TERRENCE V. CLARK
Claimant

VS.

FULLER FOUNDATION CO.
Respondent

AND

FEDERATED MUTUAL INSURANCE CO.
Insurance Carrier

Docket No. **1,063,749**

ORDER

Claimant requests review of the February 27, 2013, preliminary hearing Order entered by Administrative Law Judge (ALJ) Kenneth J. Hursh. Michael W. Downing, of Kansas City, Missouri, appeared for claimant. M. Joan Klosterman, of Kansas City, Missouri, appeared for respondent and its insurance carrier (respondent).

The record on appeal is the same as that considered by the ALJ and consists of the preliminary hearing transcript dated February 27, 2013, with exhibits, and all pleadings contained in the administrative file.

ISSUES

The Administrative Law Judge (ALJ) found claimant sustained personal injury by accident arising out of and in the course of his employment on December 7, 2012. The ALJ further found:

The respondent and insurance carrier shall pay the claimant temporary total disability benefits at the rate of \$431.69 per week from December 8, 2012 until the claimant is released to return to work with no restrictions on account of the work injury, is returned to accommodated employment, reaches maximum medical improvement for the work injury, or begins receiving social security retirement benefits.

Claimant requests review of whether the respondent is entitled to a setoff for claimant's receipt of retirement benefits, pursuant to K.S.A. 44-501(f), for the TTD benefits ordered by the ALJ. Claimant argues that Social Security retirement benefits were not intended to reduce claimant's weekly TTD compensation rate.

Respondent contends claimant's application for review should be dismissed for lack of jurisdiction, pursuant to K.S.A. 44-534a(a)(2) and K.S.A. 44-551(i)(2)(A). In the alternative, respondent maintains the ALJ's Order should be affirmed.

PRINCIPLES OF LAW & ANALYSIS

The Board's review of preliminary hearing orders is limited. Not every alleged error in law or fact is subject to review. The Board can review only those issues listed in K.S.A. 44-534a(a)(2). Those issues are: (1) whether the employee suffered an accident, repetitive trauma or resulting injury, (2) whether the injury arose out of and in the course of the employee's employment, (3) whether notice is given, or (4) whether certain defenses apply. The term "certain defenses" refers to defenses which dispute the compensability of the claim under the Workers Compensation Act.¹ The Board can also review those decisions when a party alleges the ALJ exceeded his jurisdiction.²

The issues of whether a worker is entitled to TTD, and the amount of the weekly TTD benefit, are not generally considered jurisdictional. An issue regarding whether a worker is entitled to TTD is fully within the authority granted to ALJ's.

Jurisdiction is defined as the power of a court to hear and decide a matter. The test of jurisdiction is not a correct decision but a right to enter upon inquiry and make a decision. Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly.³

The review requested by claimant is dismissed for lack of jurisdiction.

WHEREFORE, the undersigned Board Member finds that claimant's request for Board review of the February 27, 2013, preliminary hearing Order entered by ALJ Kenneth J. Hursh is hereby dismissed for lack of jurisdiction.

IT IS SO ORDERED.

¹ *Carpenter v. National Filter Service*, 26 Kan. App. 2d 672, 994 P.2d 641 (1999).

² K.S.A. 2012 Supp. 44-551(i)(2)(A).

³ *Allen v. Craig*, 1 Kan. App. 2d 301, 303-04, 564 P.2d 552, *rev. denied* 221 Kan. 757 (1977).

Dated this _____ day of May, 2013.

HONORABLE GARY R. TERRILL
BOARD MEMBER

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Kenneth J. Hursh, ALJ